

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	

To: The Secretary, Federal Communications Commission

Attn: Wireline Competition Bureau

**CRITICAL MESSAGING ASSOCIATION COMMENTS  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

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July 9, 2012

## SUMMARY OF POSITION

CMA submits that the overriding principle governing expansion of the contribution base should be that if a type of facility is eligible to receive USF support, the service provider should be required to contribute to the USF for the services they provide over such facilities, regardless of whether or not a particular provider actually receives USF support. More specifically, CMA submits that since wireline and wireless facilities providing Internet access service will now be eligible for USF support as a result of the Commission's repurposing of USF, the Internet access services provided over those facilities should be required to contribute to USF regardless of whether such services are considered "telecommunications" or "information" service. Similarly, all wireless data services provided over mobile telephony facilities should be required to contribute to USF regardless of whether or not particular data services (*e.g.*, text messaging) afford the user Internet access, since mobile telephony networks are now and will continue to be recipients of USF support and mobile telephony carriers benefit substantially from the text messaging revenues made possible in part by the USF support. Fundamental fairness to other contributors to USF requires no less.

CMA also fully adheres to its previously-stated position that the current "percentage-of-interstate/international-revenues" (the "Revenues") contribution methodology remains the most equitable way of assessing USF contributions and should be retained, with the contribution base expanded as noted above. The philosophical flaws and implementation complexities of both a contribution system based on assessments of telephone numbers (a "Numbers" system) and a contribution system based on assessing bandwidth or transmission capacity (a "Connections" system) should disqualify either of them from serious consideration.

Finally, CMA agrees that defining the *de minimis* exemption in terms of assessable revenues rather than on the basis of a contribution threshold could be a useful change, but the FNPRM's suggested revenue exemption of \$50,000 is grossly low. Rather, the exemption should be raised to at least \$1,250,000 of annual assessable interstate/international revenues.

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY OF POSITION.....	i
TABLE OF CONTENTS.....	iii
Introduction and Background .....	1
Comments on FNPRM.....	3
I. PRELIMINARY .....	3
A. The Commission Ultimately Is Responsible to Factually Support Its Reform Decisions with Appropriate Analysis and Data, Regardless of the Extent Data Are Adduced by Private Parties .....	3
II. CONTRIBUTORS TO UNIVERSAL SERVICE .....	4
A. The Fundamental Principle Governing Expansion of the Contribution Base Should Be that Services Provided on Facilities Eligible for USF Support Should Be Required to Contribute to the Universal Service Fund .....	4
B. The Commission Should Not Adopt Broad Definitions of Contribution Obligations, But Should Enumerate Assessable Services as Specifically as Possible .....	7
III. ASSESSING CONTRIBUTIONS	
A. The Commission Should Retain and Reform the Current Revenues-Based Contribution System .....	8
B. The <i>De Minimis</i> Exemption Should Be Substantially Enlarged.....	11

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**COMMENTS ON  
FURTHER NOTICE OF PROPOSED RULEMAKING**

THE CRITICAL MESSAGING ASSOCIATION (CMA),<sup>1</sup> by its attorney, respectfully submits its comments to the Federal Communications Commission in response to the Commission's Further Notice of Proposed Rulemaking (FNPRM) in the captioned proceedings, FCC 12-46, released April 30, 2012 and published at 77 Fed. Reg. 33896 (June 7, 2012). As its comments in response to the FNPRM, CMA respectfully states:

**Introduction and Background**

The FNPRM is the latest in a series of orders commencing in 2001 looking towards modification of the Universal Service Fund (USF) contribution rules implemented initially in 1997 pursuant to Section 254 of the Communications Act, as added by the Telecommunications Act of 1996, 47 U.S.C. §254. Interested parties, including CMA, have commented at length over the years on various proposals to reform the method by which USF contributions are assessed. The FNPRM primarily seeks to refresh the record on these proposals in light of the objectives of the

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<sup>1</sup> Formerly the American Association of Paging Carriers (AAPC).

National Broadband Plan (NBP), but also seeks to comprehensively review USF contribution issues, including potential reform of the administration of the contribution system.

CMA is the national trade association representing the interests of the critical messaging industry (historically known as the paging industry) throughout the United States. As wireless services have evolved over approximately the last decade, the critical messaging industry has increasingly concentrated on serving the specialized, emergency alerting needs of health care providers, first and second responders, and other customers employing critical, time-sensitive messages using a point-to-multipoint protocol that cannot be duplicated by broadband networks. CMA members include a representative cross-section of carriers operating messaging networks licensed by the Commission under Parts 22, 24 and 90 of its rules, as well as equipment suppliers and other vendors to the carrier industry.

Paging service is one of the enumerated telecommunications services that has been required to contribute since the inception of the USF.<sup>2</sup> In fact, critical messaging and other paging carriers are in the anomalous position of being required to contribute to USF on substantially the same basis as mobile telephony (cellular/PCS) carriers, at the same time critical messaging and other paging carriers, unlike mobile telephony carriers, are barred from receiving USF high-cost support for critical messaging networks. Accordingly, CMA has a direct interest in proposals to reform the USF contribution methodology, and it has participated directly and substantially in the various proceedings over the years in which issues concerning USF contribution methodology have been raised.

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<sup>2</sup> See, e.g., 47 C.F.R. 54.706(a)(1) (listing “paging services” as one of the “interstate telecommunications” required to contribute to the USF).

## Comments on FNPRM

### I. PRELIMINARY

#### A. The Commission Ultimately Is Responsible to Factually Support Its Reform Decisions with Appropriate Analysis and Data, Regardless of the Extent Data Are Adduced by Private Parties.

Throughout the FNPRM the Commission charges commenting parties to provide data and other facts to support their positions. While the objective of these repeated injunctions may be laudable, CMA is concerned that they may signal a belief that the Commission can in substance decide issues by default, *i.e.*, simply on the basis that it believes insufficient data concerning a particular issue has been provided by commenting parties.

In some circumstances that decisional approach indeed may be appropriate. However, CMA would remind the Commission that it has an affirmative obligation to determine the public interest when adopting new rules, and it may not simply call balls and strikes on the data submitted for the record by private parties. CMA would also remind the Commission that most of the data pertinent to contribution reform is already in USAC's possession and thus is available to the Commission for analysis, but generally not to private parties. Therefore, CMA cautions the Commission against reflexively rejecting arguments in this proceeding simply because the proponent has not provided what the Commission considers adequate data in support of them.

In a related vein, CMA also points out that there are some discrepancies in the data included in the FNPRM, which the Commission should clarify or otherwise explain prior to issuing its decision. CMA appreciates that there is a considerable amount of useful data included in the FNPRM. However, according to ¶20 of the FNPRM, USF demand in 2011 was \$8.1 billion and the USF revenue base was \$67 billion. This would suggest an annual contribution factor for 2011 of 12.1% (\$8.1 billion divided by \$67 billion), but the actual USF contribution factors as-

essed in 2011 were quite different, *viz.*, 15.5% for the first quarter; 14.9% for the second quarter; 14.4% for the third quarter and 15.3% for the fourth quarter. This discrepancy is not explained in the FNPRM but should be, or the data corrected, prior to rendering a decision.

As another example, Chart 2 on p. 15 of the FNPRM (included in ¶20) states that interstate/international revenues from fixed local service in 2011 were \$15 billion, from mobile service were \$25 billion and from toll service were also \$25 billion. Those figures, however, add up only to a \$65 billion contribution base for 2011, not the \$67 billion stated elsewhere in ¶20. Again, the discrepancy is not explained in the FNPRM but should be, or corrected data submitted for the record, prior to rendering any decision.

## II. CONTRIBUTORS TO UNIVERSAL SERVICE

### A. The Fundamental Principle Governing Expansion of the Contribution Base Should Be that Services Provided on Facilities Eligible for USF Support Should Be Required to Contribute to the Universal Service Fund.

One of the most important issues raised by the FNPRM is the question of how the assessable revenue base for the USF should be expanded. Given that the Commission has recently reformed the distribution side of the USF to support facilities for Internet access, both wireline and wireless, CMA submits that the resolution of this fundamental issue is obvious: wireline and wireless Internet access services and other wireless data services provided over mobile telephony networks, such as text messaging services, are eligible for and will be supported by the USF, so those services also should be required to contribute to USF regardless of whether they are classified as “telecommunications” or “information” services. Fundamental fairness requires no less than adopting the principle that services supported by the USF also must contribute to USF.

In fact, CMA submits that failure to adopt this principle would fatally undermine the legal foundation of the USF going forward. This is so, in CMA’s view, because it would mean



that telecommunications services would be required to support the provision of both telecommunications and information services, while information services would be exempted altogether from contributing any support. It is impossible to understand how such a policy could be reconciled with the statutory requirement that USF contributions be made on an “equitable and non-discriminatory” basis.<sup>3</sup> Similarly, if it is in the public interest for the USF to support wireline and wireless facilities for Internet access, as the Commission has already determined, then it follows that it likewise is in the public interest for those same services to contribute support in equal measure to the USF.<sup>4</sup>

In this regard, CMA notes that the original theory behind contributions to the USF was that all providers of interstate telecommunications services benefit from having universal (telecommunications) service available, and, therefore, all (telecommunications) providers should contribute to the USF. The same cannot be said, however, when the USF is broadened to support facilities for Internet access, as the Commission has done. Users and providers of telecommunications services do not inherently benefit from the universal availability of Internet access services, so the contribution “equities” in the latter case necessarily must be rebalanced in order to survive scrutiny under Section 254. In CMA’s view, the *only* way the equities can be lawfully rebalanced in this context is to extend the requirement to contribute to the USF to those classes of services and facilities that will newly benefit from the USF support.

CMA further points out that so extending the contribution base should be sufficient to corral the contribution factor and bring it back to a level consistent with the original USF program. The FNPRM in ¶71 cites a TIA estimate that wired broadband access generated \$38.3 bil-

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<sup>3</sup> 47 U.S.C. §254(b)(4), (d). For this reason the arguments complaining that assessing broadband for USF would retard the adoption of broadband [*cite*] are irrelevant even if true. The USF is not a charity; contribution rules must meet the statutory standards.

<sup>4</sup> See 47 U.S.C. §254(d) (authorizing the Commission to require contributions “if the public interest so requires”).

lion in revenues in 2011, and will generate an estimated \$40.3 billion in 2012. The FNPRM also cites TIA's estimate that wireless data (which includes text messaging in addition to Internet access and email) generated \$73.6 billion in 2011 and will generate \$89.8 billion in 2012. While a minor amount of the wireless data revenues already may have been included in the reported USF revenue base for 2011, CMA believes it is fair to assume that no more than a minor amount was so reported, given the aggressive stance of the mobile telephony industry on excluding text messaging revenues from USF contributions.<sup>5</sup>

Therefore, if the estimated wireless data revenues of \$73.6 billion in 2011 were added to the estimated \$38.3 billion in revenues generated by wired broadband access and the \$67 billion in USF assessable revenues in 2011, the total USF contribution base for 2011 would have been \$178.9 billion compared to the \$67 billion of assessable revenue actually reported for 2011. In turn, the \$8.1 billion USF revenue requirement for 2011 would have translated to a contribution factor on the order of 4.5%, compared to the approximately 15% actually assessed by the Commission during 2011. A contribution factor on the order of 4.5% would at least approximate the contribution factors assessed by the Commission during the first year of the USF;<sup>6</sup> and, given the anticipated growth of Internet access and wireless data services over the next several years, CMA submits that taking these steps should be sufficient by themselves to put the USF on a fiscally reasonable and sustainable basis for the future.

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<sup>5</sup> See, e.g., comments filed in WC Docket No. 06-122 in response to the Public Notice concerning USAC's request from guidance on whether text messaging revenues are assessable for USF purposes, DA 11-853, released May 9, 2011.

<sup>6</sup> The contribution factors for 1998 were 3.91% for the first quarter, 3.90% for the second quarter, 4.62% for the third quarter and 3.93% for the fourth quarter. See Public Notices reported at 12 FCC Rcd (CCB 1997); 13 FCC Rcd 4609 (CCB 1998); 13 FCC Rcd 9379 (CCB 1998); and 13 FCC Rcd 15588 (CCB 1998).

B. The Commission Should Not Adopt Broad Definitions of Contribution Obligations, But Should Enumerate Assessable Services as Specifically as Possible.

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The FNPRM also inquires whether the Commission should adopt a broad definitional approach for determining who should contribute to the USF, without enumerating specific services subject to assessment. In this regard, the FRNPRM inquires about adopting a general rule reading as follows: “*Any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless), directly or indirectly through an affiliate, to end users*”, explaining that the text is intended “to encompass only entities that provide transmission to their users, whether using their own facilities or by utilizing transmission service purchased from other entities.” (FNPRM at ¶¶75, 76).

CMA strongly urges the Commission *not* to take such an approach in defining USF contribution obligations. The concept of “provid[ing] the transmission,” when the notion of resale is included in the mix, is way too amorphous for USAC to administer. Based on its track record to date, USAC is institutionally incapable of exercising judgment in a reasonable manner, and entrusting it to apply such a nebulous standard would invite a nearly complete disaster. The Commission may think it already is inundated with appeals from USAC decisions, but CMA is confident that the situation would only degenerate if USAC is charged to determine which entities “provide” transmission to end users, “directly or indirectly”.

USAC functions best when it is given clear and precise marching orders by the FCC; and CMA emphatically requests that the Commission be as precise and unambiguous as possible in defining for USAC what services must contribute to USF.

### III. ASSESSING CONTRIBUTIONS

#### A. The Commission Should Retain and Reform the Current Revenues-Based Contribution System.

CMA previously has discussed at some length its preference that the current “Revenues” system should be retained, with an expanded contribution base, and that the alternatives of a “Numbers” or “Connections” based system should be rejected.<sup>7</sup> CMA adheres to and relies upon its previous comments and critiques on these issues, and in these comments will simply summarize the principal relevant points.

“Revenues” should be retained because it is the best method of correlating USF contributions to the value of the network to users and the usage of the network by users. For that reason alone it is the most logical and the fairest method of assessing USF contributions. The principal defects in the contribution system to date have been the Commission’s unwillingness to specify that certain services that arguably are “information” services rather than “telecommunications” services are nonetheless assessable for USF contribution purposes. As the FRPRM recognizes, those shortcomings can be fixed without throwing out the “Revenues” contribution methodology, and that is what the Commission should do.

By contrast, the most glaring logical flaw with a “Numbers” methodology is that it irrationally treats all uses of telephone numbers the same for USF contribution purposes. In fact, as CMA and others have pointed out at length, there is a wide disparity in both the value and usage associated with different telephone number applications, such that charging the same USF contribution for each telephone number would result in a massive, unjustified shift in the burden of

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<sup>7</sup> See, e.g., Comments of American Association of Paging Carriers on Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support, et al.*, WC Docket No. 05-337, *et al.*, November 26, 2008, available at <http://apps.fcc.gov/ecfs/document/view?id=6520188785> (last visited June 11, 2012); American Association of Paging Carriers Comments – NBP Notice #19, *A National Broadband Plan for our Future, et al.*, GN Docket No. 09-51, *et al.*, December 7, 2009, available at <http://apps.fcc.gov/ecfs/document/view?id=7020351446> (last visited June 11, 2012).

USF contributions among classes of users, and would fundamentally violate principles of competitive equality. By the same token, trying to remedy this fundamental flaw by exempting some numbers or charging different USF contributions for different types of numbers, would vastly complicate the contribution system, contrary to the FNPRM's stated objectives in reforming the contribution system.

Of at least equal importance as well is the consideration that adopting a "Numbers" contribution methodology would be inconsistent with the FNPRM's stated objective of making the USF sustainable over the long term. This is so in two respects. First, imposing a "tax" on the use of telephone numbers by basing USF contributions on their use would cause a reduction in the use of telephone numbers over the long term, reducing the base for USF contributions.

As is well known, a substantial portion of telephone number usage is for internal routing purposes rather than public network addressing, and for free or inexpensive services other than legacy voice telephone service. Imposing a USF contribution "tax" on these numbers would create substantial economic incentives to find other ways to accomplish the necessary functions or would require the applications to be discontinued. Either of those alternative results likely would create an unsustainable and reinforcing spiral of diminishing use of telephone numbers and escalating USF contribution fees. That phenomenon is precisely what the FNPRM is trying to avoid by making sustainability a key consideration in evaluating potential contribution reforms; and adopting "Numbers" would fly directly in the face of that objective.

Second, as noted above, USF high cost support is being repurposed to support the expansion of facilities for Internet access; and use of the Internet platform is expected to grow substantially in the future while the legacy PSTN eventually is supplanted. The Internet, of course, does not rely upon telephone numbers for network addressing; and it makes no logical sense whatso-

ever to base USF contributions on telephone numbers in the Internet world. If the Commission wants to reform USF contribution methodology for the world of the future, as the FNPRM professes, a “Numbers” contribution system should not receive any serious consideration.

A “Connections” contribution system should receive little more consideration than “Numbers,” and remains a significantly less desirable alternative than “Revenues”. Unlike “Numbers,” basing USF contributions on the amount of network capacity subscribed to by users does at least bear some correlation to the value and usage of network by users, but it is not at all obvious that a “Connections” system would do so in a better way than “Revenues”. In the absence of a clear advantage over the current system, there is no reason to change.

The principal, and in CMA’s view the disqualifying, disadvantage of “Connections” is that it would have to be complex in order to be reasonably fair, and it would be difficult if not impossible to enforce. To be reasonably fair, the Commission would have to “tier” USF contributions based on different types of network connections. This is not an easy task, as the record from prior proceedings demonstrates. Why the Commission should have to undertake such a task is not at all clear, in light of the availability of a better “Revenues” alternative.

Additionally, as the FRPRM points out, carriers are not required to report the quantity of their connections in any other context. It is impossible to understand how USAC could be expected to audit compliance if a “Connections” contribution methodology were adopted.

The best tool available to support implementation of a “Connections” methodology is, as the FNPRM acknowledges, the Form 477 report. Therefore, in the event the Commission adopts a “Connections” contribution methodology, despite its obvious disadvantages, CMA submits that the Commission should calculate assessable connections from Form 477 reports, and should only treat entities required to file Form 477 reports as service providers for purposes of USF contribu-

tions. All other entities should be classified as “users” and should pay USF contributions to their connections provider.

In short, CMA submits that an objective evaluation of the various alternatives unambiguously results in the conclusion that the current “Revenues” contribution system should be retained, with an expansion of the assessable revenue base as discussed above, and with a few minor “tweaks” in the rules to eliminate the principal problems that have become evident over the years. A “Numbers” based system should not be adopted under any circumstances; and a “Connections” based system should be seriously considered only if it is applied to filers of Form 477 and only if it treats all other entities as users for contribution purposes.

B. The *De Minimis* Exemption Should Be Substantially Enlarged

CMA agrees with the suggestion in the FNPRM that basing the *de minimis* exemption on assessable revenues, rather than the contribution level, could be an improvement in the USF contribution system. Given the large variation in the past few years in the contribution factor, it has been much more difficult than it should be for small carriers to evaluate whether they will fall within the exemption for any given calendar year. At the same time, CMA notes that other reforms proposed in the FNPRM, if adopted, should eliminate the volatile changes in the contribution factor, which would greatly ameliorate the problem even if the exemption remains defined on the basis of contribution level. Nonetheless, CMA believes that defining the exemption on the basis of assessable interstate/international revenues could be a useful change in the rules.

However, CMA emphatically submits that the FNPRM’s suggestion of an exemption for only \$50,000 of assessable revenues is grossly and unjustifiably low. Rather, as discussed be-

low, the *de minimis* exemption should be enlarged to a minimum of \$1,250,000 in assessable interstate/international revenues.<sup>8</sup>

The statutory standard is that the Commission may exempt “a class of carriers” from the requirement to contribute if “the level of such carrier’s contribution to the preservation and advancement of universal service would be *de minimis*.”<sup>9</sup> Accordingly, CMA submits that the Commission properly should define the exemption on the basis of the overall effect of the exempted revenues on the support of the USF, rather than focusing on the level of any given entity’s contribution to USF. At the same time, the Commission should attempt to relieve small entities of the regulatory burden of USF reporting and contributions to the extent possible, consistent with the statutory standard and general public interest considerations.

As recited in the FNPRM at ¶9, currently there are 2,900 contributors to USF, of which the top five alone contribute approximately 75% of all USF contributions. The FNPRM does not provide further details, but if bottom half of the 2,900 contributors made contributions of as much as \$50,000 each (which is unlikely given distribution probability), total USF contributions by the bottom 1,450 contributors at most would be only \$72.5 million.

Given the \$8.1 billion USF revenue requirement in 2011 (FNPRM at ¶20), contributions totaling \$72.5 million by the bottom 1,450 contributors would have amounted to *less than one percent of the total*. Under any conceivable standard, contributions aggregating less than one percent of the total have to be considered *de minimis*. Accordingly, the Commission’s focus in this proceeding in redefining the *de minimis* exemption properly should be on eliminating the

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<sup>8</sup> CMA has previously urged in response to the Commission’s biennial review of its rules that the \$10,000 *de minimis* exemption is too low and should be raised to at least \$50,000. See AAPC *ex parte memorandum* dated July 13, 2011 in WC Docket No. 06-122 and attached comments in GB Docket No. 09-229, available at <http://apps.fcc.gov/ecfs/document/view?id=7021691882> (last visited July 3, 2012). CMA relies upon and incorporates its previous comments and arguments in this proceeding as well.

<sup>9</sup> 47 U.S.C. §254(d).



large number of small contributors whose collective impact on the USF program is negligible. Subject to disclosure of more definitive information on USF contributions by the Commission, a contribution exemption of at least \$50,000 annually should be considered *de minimis*.

If this exemption is then translated into assessable revenues, the appropriate benchmark for doing so is *not*, as the FNPRM suggest, the bloated contribution factor characteristic of the past few years. Rather, the appropriate benchmark should be a “normalized” contribution factor, such as the contribution factor when the USF program was initially implemented in 1998.

As noted above, the contribution factor for 1998 was something less than four percent.<sup>10</sup> Using an even four percent for simplicity, a \$50,000 contribution exemption translates into an exemption up to \$1,250,000<sup>11</sup> in assessable interstate/international revenues. Therefore, if the *de minimis* exemption is defined in terms of assessable revenues, USF contributions should not be required for entities generating less than \$1,250,000 in assessable interstate/international service revenues.

Respectfully submitted,

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July 9, 2012

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<sup>10</sup> See n. 6, *supra*, and accompanying text.

<sup>11</sup> \$50,000 divided by 4% is \$1,250,000.